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No. 73-1029

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

JULIUS WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 486 F.2d 468.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1973. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to December 31, 1973, and the petition was filed on

January 2, 1974, the first day the Court was open after December 30, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial when the United States Attorney outlined in his opening statement the expected testimony of a witness who thereafter did not testify to many of the details which had been expected, where the jury was cautioned by the government attorney and the trial judge that statements made by the government attorney were not evidence and should be disregarded.

2. Whether petitioner was prejudiced when the United States Attorney recalled this witness to the stand after obtaining transactional immunity for him and asked certain questions based on a statement made by the witness to federal agents and where the defense did not cross-examine the witness.

3. Whether evidence admitted against petitioner at trial was seized as a result of two illegal searches.

STATEMENT

After a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted of bank robbery by force and violence, bank robbery by assaulting and killing a bank employee, and use of a firearm to commit a felony, in violation of 18 U.S.C. 2113(a), 2113(e), and 924(c)(1). He was sentenced to twenty years' imprisonment and fined $5,000 on the first count,

life imprisonment on the second count, and ten years' imprisonment on the third count, the sentences to run concurrently. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

1. The evidence, which is set forth in the opinion of the court of appeals (Pet. App. A, 53-58, 61), established that on January 10, 1972, the First National Bank of East Lansing, Michigan, was robbed by a male posing as a female, wearing a black and green coat and an "Afro" wig. The bank manager struggled with the robber in an attempt to prevent the robbery, and was fatally shot. During the struggle, a button was torn off the black and green coat, and an earring and part of another earring were pulled from the robber's ears; these were later found by police at the scene of the struggle (T. 187-189).[1]

Petitioner's sister-in-law testified that, on the evening after the robbery, petitioner boasted that he and his wife had robbed the bank and that he had shot a man five times; she stated that petitioner was holding a large number of $50 bills and bills of other denominations. Petitioner told her that he had been dressed as a woman, wearing a "natural" wig, earrings, a coat, and other women's clothing.

Petitioner's sister-in-law also identified a revolver as being her husband's, but stated that petitioner had access to the gun. After the robbery she had been given the gun by her husband and arranged to have it buried; the gun was recovered by the Federal

[1] "T." refers to the trial transcript.

Bureau of Investigation, and ballistics tests established that the bullet removed from the body of the slain bank manager had been fired from that gun.

Petitioner's sister-in-law also testified that the day after the robbery petitioner's wife gave her a coat similar to the one worn by the robber; this coat was eventually turned over to the F.B.I. Laboratory tests revealed that a hair fiber found on the coat matched hair from the head of petitioner (T. 306-307), and that two hairs found on the coat matched hair obtained from the head of the slain bank manager (T. 308, 325). Also, fibers from the coat matched fibers found in the bank manager's tie clasp and on his clothing.

Several witnesses observed a car, later identified as being registered to petitioner's wife, in the vicinity of the bank around the time of the robbery. One witness saw the car parked on the bank parking lot; a woman was standing outside, and a person who the witness thought was a woman was seated inside. Other witnesses saw the same car with two Negro occupants wearing "Afro" hair styles.

About five months or so before the robbery, in a conversation with his brother-in-law, petitioner said that the East Lansing bank would be easy to rob because it was located in a secluded place; they discussed the feasibility of a male robber disguising himself as a woman. Petitioner customarily wore a moustache and goatee, but the day before the robbery he was clean-shaven. In addition, a fellow inmate testified that petitioner, while he was in custody await-

ing trial, told him that "they could not prove it was me because nobody could identify me."[2] Finally, petitioner's stepson testified that the day after the robbery he found, hidden inside his tennis shoes, a wig, which he later turned over to the F.B.I. and which was proven at trial to have been connected with the bank robbery.

2. Two searches of petitioner's apartment led to the seizure of evidence which was introduced against him at trial. The first, which the government contended was a valid consent search, yielded a spool of thread similar to the thread used to make the earrings found in the bank, and a button which matched those on the coat later received from petitioner's sister-in-law. The second search, conducted pursuant to a warrant, yielded a rhinestone Christmas-tree shaped ornament which matched the earrings found in the bank, and the black fibers which matched fibers on the coat and fibers from the wig petitioner's stepson had found.

3. Petitioner denied committing the robbery, claiming he had remained home alone that day, in pain from an arthritic spinal condition (T. 395-396). He stated that his wife's green and black coat had been stored in the basement of the apartment building (T. 415-416). Petitioner admitted shaving off his moustache and goatee prior to the date of the robbery, but stated he did this because he had ruined

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[2] It is not surprising that none of the witnesses could identify petitioner at trial or at pre-trial proceedings, in view of the fact that the robber wore an elaborate disguise.

the moustache accidentally while trimming it (T. 414). He further admitted that the car in question was registered to his wife, but stated that it actually belonged to his brother-in-law (T. 414-415).

ARGUMENT

1. Petitioner contends that he was denied a fair trial when the prosecutor outlined in detail in his opening statement the expected testimony of petitioner's stepson, Timothy Williams, who thereafter did not testify to many of the details which had been expected, even though the jury was cautioned that statements made by the government attorney were not evidence and should be disregarded. He contends further that such prejudice was compounded when the prosecutor recalled Williams to the stand after obtaining transactional immunity for him, and asked certain questions based upon a statement the witness had made to the F.B.I., some of which Williams still refused to answer. These contentions are without merit.

The facts relating to these issues are set forth in the opinion of the court of appeals (Pet. App. A, 57-59). In his opening statement the prosecutor outlined the evidence he expected from his witnesses and included a summary of evidence he expected from petitioner's stepson. He said he expected the stepson to testify that he did not attend high school classes on the day of the robbery, that he was home when his stepfather and mother arrived, that his stepfather was dressed like a woman, that his stepfather asked

his mother if they had obtained any "ones," and that he helped unfasten a brassiere his stepfather was wearing. Williams had earlier given a statement substantially to this effect to F.B.I. agents (T. 193-196),[3] and he was expected to testify at trial (T. 197). When he was first called as a witness Williams refused to testify. Because of his youth the court appointed counsel to represent him and, based on his invocation of his Fifth Amendment privilege, he was later granted transactional immunity. When he was recalled to the stand, Williams stated that he preferred not to answer, or did not recall the answer to, most of the questions asked by the government, but he did testify that he found part of a wig hidden inside his tennis shoes the day after the robbery. He testified that he later gave the wig to the F.B.I., but that he did not know who had put the wig into his tennis shoes.

At the outset, we point out that petitioner is not well-situated to complain about the procedures followed regarding the testimony of his stepson, because, as we note in the margin,[4] the problems were apparently caused by petitioner's own wrong-doing. In

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[3] The statement was read into the record out of the presence of the jury.

[4] On the second day of the trial the United States Attorney, Mr. Milanowski, stated to the trial judge, out of the hearing of the jury (T. 136):

> I just have information from an F.B.I. Agent who interviewed Timmy Williams that Timmy told him some other party advised him that Julius West was going to use the money which he took from the bank as a method

any event, should the Court deem it proper to consider these issues, we contend that the actions taken by the prosecutor were entirely proper and do not require further review.

a. Petitioner's contention that he was deprived of a fair trial by the prosecutor's outline of expected testimony, not all of which was forthcoming, was thoroughly answered in the following portion of the opinion of the court of appeals, upon which we rely (Pet. App. A, 59-61; 486 F.2d at 471-472):

> At the outset, we observe that this is not a case where an inflammatory opening statement was made to poison the minds of the jury against a defendant or to destroy his credibility before any evidence should be presented. *Cf. United States* v. *Signer*, 482 F.2d 394 (6th Cir., 1973).

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of hiring other people to kill Timmy Williams in the event that he would testify.

This was corroborated by one of Williams' appointed counsel who stated (T. 137):

> Tim has a number of concerns about his testimony. He has indicated to Mr. Quist and to myself that one of the primary concerns is some threat made against him. But he has not indicated to us the source of this threat or reported its exact nature.

Insofar as the problems regarding Timothy Williams' testimony were primarily due to threats made against the witness on behalf of petitioner, this Court would be justified in refusing to hear petitioner's complaints. "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Reynolds* v. *United States*, 98 U.S. 145, 158. See also *Motes* v. *United States*, 178 U.S. 458, 471-472; *Douglas* v. *Alabama*, 380 U.S. 415, 420.

Nor is it a case where the prosecution made an opening statement in bad faith without any reasonable expectation of presenting the promised evidence. *See San Fratello* v. *United States* 340 F.2d 560 (5th Cir. 1965). And it is not a case where a prosecutor, in his questioning of a witness who claimed his privilege against self-incrimination, employed improper examination techniques such as reading the entire transcript of an FBI interview to see whether the witness would contradict it, *United States* v. *Compton*, 365 F.2d 1 (6th Cir. 1966); or persistently asking the same questions that had been repeatedly answered in the negative, *Jones* v. *United States*, 119 U.S. App. D.C. 213, 338 F.2d 553 (1964); or prefacing questions with the inquiry "did you tell me" in such a manner as to place in issue the prosecutor's credibility, *United States* v. *Puco*, 436 F.2d 761 (2d Cir. 1971). Here appellant does not accuse the prosecution of any misconduct and we find none.

Appellant contends, nonetheless, that error was committed because the opening statement placed before the jury the testimony of Timothy Williams, testimony that appellant could not test by cross-examination because the witness refused to be examined on the critical matters related. Accordingly, he claims his constitutional right to be confronted by the witnesses against him was abridged. *See Douglas* v. *Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965).

However, we determine that the facts in this case bring it within the rule of *Frazier* v. *Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 22 L.Ed.2d 684 (1968), instead of that enunciated in *Douglas*, *supra*, where under guise of cross-examination,

and despite the refusal of a witness to answer, the prosecution read, in the presence of the jury, the witness's confession that implicated the defendant and then proceeded to authenticate the confession, although it was never introduced in evidence, by the testimony of three law enforcement officers. In *Frazier* v. *Cupp*, it was held that no deprivation of the right of confrontation results when a prosecutor sets forth in his opening statement a summary of the testimony he expects, in good faith, from a witness who later declines to testify, when the summary is not emphasized in any particular way, takes only a few minutes to recite, and is sandwiched between a summary of other evidence the prosecution expects to introduce. In this appeal, Williams' testimony was not isolated in the opening statement but, instead, was an integrated part of a statement that fairly summarized all the evidence, circumstantial and direct, that the prosecution intended to present to prove the crimes charged in the indictment. And, as in *Frazier* v. *Cupp*, the district court advised the jury that the opening statement, as the United States attorney also declared, is not evidence and should not be so regarded.

Another factor not to be overlooked in this case is that Williams was called as a government witness and did in fact testify, although his direct testimony was limited by his professions of lack of memory and by his declining to answer significant questions. Also not to be overlooked is the fact that Williams was offered for cross-examination, a right the defense declined to exercise.

> We observe, however, that this case alerts us to the potential danger presented by a too-detailed opening statement. If a failure of proof should occur, the jury in its deliberations might consider, as if it had been given, the testimony it was told to expect from a witness even though that witness did not testify. And if a court apprehends a substantial danger of a jury's doing so, the prosecution risks a mistrial or reversal of a conviction. Here, we are satisfied that the prosecutor did not overstep the line drawn by *Frazier*, and did everything he could after the opening statement to prevent prejudice in this respect. He obtained an order of immunity to require the witness to testify and he could have insisted on the witness answering his questions. That he and the court did not follow this course may have been because Williams' lawyer and the prosecutor disclosed that the boy had been threatened by appellant in an effort to seal his lips. A careful review of the entire record convinces us that no error was committed with respect to the opening statement and the testimony of Timothy Williams.

b. Petitioner's related claim that he was deprived of a fair trial when the prosecutor called Timothy Williams the second time, allegedly knowing that he would not testify, is answered by the fact that the witness did testify to at least one fact pertinent to the robbery, namely, that he found a wig connected with the robbery in his tennis shoes. Even if the witness had not testified, however, it would not have been error to call him to the stand where

the prosecutor had an honest belief that the witness had information pertinent to the issues in the case and where his action in calling the witness was done in good faith. See *Frazier* v. *Cupp*, 394 U.S. 731, 733-737; *Namet* v. *United States*, 373 U.S. 179; *United States* v. *Compton*, 365 F.2d 1, 5 (C.A. 6), certiorari denied, 385 U.S. 956. Here the witness was called in the honest expectation that he would testify to matters pertinent to the robbery, and he did testify to one such matter.

Petitioner contends, however, that "the United States Attorney's questions to [Williams] * * * clearly brought to the attention of the jury the elements of his statement [to the F.B.I.] which had been outlined in the opening statement" (Pet. 28). An analysis of the complete testimony of Timothy Williams (T. 214-226) shows that only five of the many questions asked by the prosecutor could have possibly led the jury to believe the questions were based on a statement to the F.B.I. The remaining questions were related to other testimony which was adduced at trial and would not have led the jury to infer the existence of a statement.

The first question was whether he had attended school the day of the robbery, and Williams answered he had not (T. 215). The second related to the concealment of the wig, and Williams testified how he found the wig and what he did with it (T. 220-222, 224-225). Of these two questions, the first was innocuous, and the second subject to cross-examination, although petitioner's counsel chose not to cross-

examine the witness. The last three questions about the coat and brassiere (T. 225) admittedly could have related to the statement made to the F.B.I.[5] However, the witness did not refuse to answer these questions; he stated that he did not remember if his stepfather came home with the coat, or if he was wearing a brassiere, or if the witness helped him unzip the bra. Certainly the statement of the witness that he did not remember if an event happened would not be taken by the jury as an assertion that the event did happen.

As for the possibility that some members of the jury remembered that the prosecutor had mentioned something about the event in his opening statement, the prosecutor himself told the jury in summation that what he said was not in evidence, and that only "what you heard the witnesses themselves say" was evidence (Tr. 487). This was further emphasized by the court's instructions to the jury, which stated (Tr. 546-547):

> You will remember that at the beginning of the trial, I stated that no remarks of counsel could be received by you as evidence. During his opening statement, the United States Attorney in outlining the witnesses and expected testimony, made

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[5] It was not error for the prosecutor to ask these questions. Because the witness answered the question about the wig, it was reasonable for the prosecutor to believe that the witness had overcome his fear and was willing to testify as to other matters within his knowledge.

certain remarks as to the expected testimony of Timothy Williams.

* * * *

[y]ou may not speculate as to what his answers would have been to questions put to him where he refused to answer.

* * * I charge you to disregard absolutely any statement made by the United States Attorney at the beginning of the trial concerning the testimony of Timothy Williams which he did not actually testify to during the trial.

We believe the United States Attorney and the trial judge did all that could be expected and successfully protected petitioner.

2. Petitioner contends that evidence was seized as a result of two illegal searches.

a. As to the first search, the day after the robbery approximately seven law enforcement officers went to petitioner's apartment, accompanied by his brother (Supp. T. 10, 19).[6] One of the agents had a shotgun which was probably visible to petitioner,[7] although an agent who was present testified that he had not seen the gun pointed at petitioner, as peti-

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[6] "Supp. T." refers to the transcript of the pre-trial motion to suppress.

[7] It is understandable that one of the agents carried a shotgun, and it was probably prudent to carry it so that petitioner could see it. Petitioner was a suspect in a vicious bank robbery during which a man had been murdered with a pistol; the danger to the agents was obvious. By keeping the gun visible, the agents may have avoided a violent reaction by petitioner to their presence.

tioner had testified (Supp. T. 74-75).[8] At the time, petitioner was in the apartment with a number of people; he agreed to an interview and was orally advised of his constitutional rights, which he said he understood, and he signed a printed waiver-of-rights form (Supp. T. 11-12, 35). The agent also asked petitioner if he would consent to a search of his premises. Petitioner consented because he said he had nothing to hide and wanted to get the matter straightened out (Supp. T. 12). Petitioner also executed a written consent form for the search (T. 404; Supp. T. 15).[9] After about fifteen minutes, the search was terminated upon demand by petitioner (Supp. T. 13).

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[8] Petitioner testified that the shotgun was pointed at him when the agents came to the door (Supp. T. 57) and in the petition he takes this as established fact (Pet. 40); the court of appeals seems to have assumed arguendo that this was true (Pet. App. A 62). It should be noted, however, that the trial court found only that "there was a weapon present and that probably it was in view" (Supp. T. 78), and did not find that it was pointed at petitioner.

[9] Petitioner testified that the agent stated he would get a warrant if he did not consent to the search (Supp. T. 59) and the petition takes this as established fact (Pet. 40), although one of the agents testified that he did not hear any such statement made to petitioner (Supp. T. 55), and the trial court did not make any finding on this matter. The court of appeals seems to have assumed *arguendo* that the statement was made, and further stated that the agents' request for a search warrant had just been denied by a magistrate (Pet. App. A 62). This latter statement has no support in the record and is not even claimed by petitioner. Perhaps the error is due to a statement in the record that the agents called the United States Attorney, Mr. Milanowski, who said he thought they did not have enough evidence to get a search warrant (Supp. T. 54).

The evidence clearly indicates a valid consent search. The trial court found that (Supp. T. 78):

> the testimony supports the voluntariness of the consent to search to the extent that it was made, up to the time, of course, that that consent was withdrawn. I take into account the fact that there was a weapon present and that probably it was in view. I see nothing in the proofs to show any state of mind in the defendant, Julius West, which made it such he was placed in such fear or under such coercion as to make it a forced search and to take away the voluntariness. * * * He understood that a search warrant would have to be obtained, and I think he knew that he could, as he later did, could [*sic*] refuse his consent or withdraw it, or decline altogether in the first instance.

If, as petitioner states, he had been intimidated by the sight of the gun, or if he had been led to believe it was useless to refuse consent, he certainly would not have demanded that the officers leave the apartment after fifteen minutes, while they were still searching. Petitioner's actions belie his contention. *Schneckloth* v. *Bustamonte*, 412 U.S. 218.

b. The second search was pursuant to a search warrant. Two days after the consent search, an F.B.I. agent appeared before a United States Commissioner and submitted an affidavit for a search warrant for the residence of petitioner and his wife (Pet. App. C, 99-101). This affidavit stated in pertinent part that the bank had been robbed three days earlier and the manager killed, that petitioner's wife admitted

being at the bank in her car at the time of the robbery, that several witnesses had seen two persons in her car at about that time, and that a button found near the body of the dead manager matched a button found at the premises of petitioner and his wife, the premises to be searched (this button had been found during the consent search). Accordingly, even without reference to the information given by the informants, of which petitioner complains (Pet. 46-49), there was sufficient evidence to support the Commissioner's finding that there was probable cause to believe evidence from the robbery might be found at the apartment. See, *e.g.*, *United States* v. *Ventresca*, 380 U.S. 102.

c. The court of appeals did not decide the issue of the validity of the searches because it found that "the evidence obtained from them, considered in the light of the other overwhelming proof of guilt, did not affect the verdict," and that "any error resulting from the admission of this evidence is harmless beyond a reasonable doubt" (Pet. App. A, 62). Although we believe the searches were valid, we agree that, in light of the other evidence, the evidence taken in the searches did not affect the verdict. The government had introduced a confession by petitioner to his sister-in-law, an incriminating statement to a fellow inmate, a discussion with his brother-in-law about the possibility of using the very plan which was later used, the presence of petitioner's hair on a coat on which hair of the dead bank manager was also found, a wig which had been hidden in his stepson's tennis

shoes, and the fact that petitioner's wife's car was seen near the bank at the time of the robbery. Compared to this overwhelming evidence, the button, thread, wig fibers, and ornament found in the searches were insignificant. *Brown* v. *United States*, 411 U.S. 223, 231-232; *Chapman* v. *California*, 386 U.S. 18, 22.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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